No. 22702

United States Court Of Appeals

FOR THE

Ninth Circuit

ETHEL JIMISON and RAY JIMISON,

Plaintiffs and Appellants,

vs.

UNITED STATES OF AMERICA

Defendant and Appellee.

On appeal from the United States District Court for the District of Montana, Billings Division

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BRIEF OF APPELLANTS

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SUBJECT INDEX

TABLE OF CASES AND AUTHORITIES

Page

TABLE OF CASES:

Page

Page

TABLE OF OTHER AUTHORITY

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STATEMENT OF GROUNDS UPON WHICH JURISDICTION OF THE DISTRICT COURT AND OF THIS COURT IS INVOKED.

This action is a civil action on a claim against the United States for money damages. The claim accrued after January 1, 1945, and is a claim for injury to property by one plaintiff and personal injury by the other plaintiff claimed to have been caused by the negligent or wrongful act or ommission of an employee of the United States while acting within the scope of his employment. (Tr. Vol. I, pp. 2-5) Exclusive jurisdiction of such cases is conferred on United tStates District Courts by statute, **Title 28 U.S.C.A. Sec. 1346(b).** This Court has appellate jurisdiction by virtue of **Title 28 U.S.C.A. Section 1291.**

STATEMENT OF THE CASE

(Note: All references are to the Transcript of the Trial, Vol. II, unless otherwise indicated.)

This case arises because of an automobile collision which occurred Monday, July 15, 1963, (7-9) about 12 o'clock noon. (63-71) The collision occurred on a highway bridge situated about 2 miles Southeast of the town of Culbertson (9) in Northeastern Montana. The highway bridge, 1121 feet in length, runs North-South across the Missouri River. It serves Montana State Highway Number 16 (Ex 10) and is the only bridge across the river for a distance of 54 miles West and 18 miles East. (78) The bridge is slightly arched, (Ex 16) 20 feet wide (Ex 10) and paved with concrete. (107) The road to the South is an asphalt road (106-107) 21 feet wide. (Ex 10) The highway runs straight South from the bridge, with a slight downward slope, (Ex 16 & 11) for a distance of about 2100 feet (Ex 10) where, after crossing a small wooden bridge, it curves so that it cannot be observed from the bridge in question. The bridge has no sidewalks; (Ex 15, 16) it was designed to be used by motor vehicles only. The traffic across the bridge was described as "pretty heavy, and other days not too heavy," (38) by Mr. Ramsbacher, the government witness who testified and as " - - intermittent.

Some days it is very heavy and some days you don't meet any traffic at all" (77) by the highway patrolman who investigated the accident.

On the day of the accident Clifford Ramsbacher, an employee of the Geological Survey (an agency of the defendant) came to the bridge in the course of his employment to collect data with respect to the flow of the river. (7-9) This employment required him to assemble what he called a "Bridge Crane". A device made of angle iron about 4 foot square (11) with a small boom, designed to reach over the bridge railing and lower testing in instruments into the river. (Ex 2) (The photos of the machine show it painted a bright orange and show Ramsbacher with bright clothing on also. The bright paint and clothing were not put on until after the accident. (22)) The bridge crane when assembled was pulled by hand. (11) In operating the machine Ramsbacher pulled it into the East or North bound traffic lane. (28) He would then lower the instruments into the water from the bridge and measure the depth of the water and its velocity. Measuring the depth of the water required him to peer over the railing at instruments which he had lowered and measuring the velocity was done by listening (on earphones) for, and counting, each "click" one of the instruments made as it revolved in the

current. (12-13) After measuring the machine would be moved to another point and the operation repeated until the river was measured. The bridge crane was usually on the bridge for 2 hours each time the river was measured and on the day of the accident it was on there for 3 hours. (13) In addition to listening to and observing his instruments, Ramsbacher usually had no assistance and was required to direct traffic around the obstruction created by the machine (13-15,27) which took 4 feet out of the 10 foot traffic lane. (11,13-14) He was aware that the machine created a bottleneck and a hazard to traffic and was dangerous to himself, also. He said that he had complained about the situation (40-41) but the procedure remained the same. (26-27)

Ramsbacher put his machine on the bridge about 11:00 a.m. Before starting to work with it he placed a sign at the North entrance to the bridge on the right hand side which said "Men Working". (18-19) This sign was either 18" or 24" square (77 yellow in color with black lettering. When in place it had one of the points up so that it was a "diamond shape". (77) Ramsbacher had one other sign of the same dimensions and wording as the first (77) to warn North bound traffic coming toward him in the East traffic lane, of the presence of the machine.

There is considerable doubt as to where and when this sign was placed. Ramsbacher said he placed the sign about 100 feet South of that part of the bridge which had overhead structure and left it there while he measured. (20-40) He told the investigating patrolman, however, that in the 15-20 minute interval between the accident and the arrival of the officer that he had moved both his machine and sign to the South and that the collision had taken place at about the then location of the sign. (73-74) When he told the patrolman this he was at work within a few feet of the warning sign. (73-74, 116-118) That the sign was either not in use or was being used upon or so close to the machine as to be worthless for warning purposes is shown by the testimony of Ethel Jimison (97) and Jerry Jimison (58-59) both of whom observed carefully and of Tony Bucciarelli (126) who was less careful, none of whom saw any warning sign. While Mr. Ramsbacher was engaged in measuring the Jimison automobile was approaching from the South on Highway 16. (48-49) This automobile was a 1957 Chevrolet (90) in good operating condition. (50) In the front seat were Jerry Jimison on the left, his mother the plaintiff, Ethel Jimison, in the middle and his grandmother on the right. Jerry's three small sisters were in the rear seat. (50-51) Jerry Jimison, two weeks short of his 17th birthday, a licensed driv-

er for 2 years (47, 48) was proceding at a speed of 60 to 65 miles per hour. 6 or 7 miles before reaching the bridge in question he passed an automobile being driven by a Tony Bucciarelli. (52) As Jerry Jimison rounded the curve 2,000 feet from the bridge (Ex 10) he saw "a speck" on it (54) which, as he approached resolved itself into a man (Ramsbacher) and his machine. (57,58) Jerry slowed and as he come to within 50 or 60 feet of the machine, stopped because Ramsbacher had put up his hand indicating "stop" (59,60) and because there were trucks approaching on the bridge from the opposite direction. (56, 57) The Jimison car was rammed from the rear as soon as it stopped by Mr. Bucciarelli's car. Jerry said there were no warning signs visible. (59) In the last several hundred feet prior to stopping he had his foot on the brake constantly. His foot was still on the brake when the collision occurred. (61, 94) Mrs. Jimison, the plaintiff, testified. She said that she too had watched the man and machine on the bridge as the car approached. (91,92) She said that after the car stopped she heard a squealing or screeching, that she started to turn to look toward the rear of the car but that the collision occurred before she could turn. (95) Both Jerry and Mrs. Jimison were watching ahead prior to the accident. Neither of them testified as to the distance Mr. Bucciarelli was following them.

Mr. Bucciarelli produced as a witness by the defendant had no independent recollection of the events leading up to the collision until his car was in a dangerous position. He remembered the Jimison car passing him (122) and doesn't remember it again until he was about to run into it.

> "Well, when I come to the bridge I seen the car and I did not realize that the car had made a dead stop, and I realized I was gaining on it rapidly, and then I realized that the car was standing still, so I tried to stop, but I did not have enough room and I hit his rear end." (124)

Bucciarelli testified that he didn't see the bridge crane until after the accident, (128) that there were no warning signs or flagmen and if there had been he would have slowed down. (127)

Ramsbacher testified that he saw both the Bucciarelli and Jimison cars as they come around the corner which is 2,100 feet South of the bridge. He said " - - they were fairly close together. That is how come I was more or less interested in them." (110) He said that they were still close together as they come upon the bridge (32), that there was no interval of time between the stopping of the Jimison automobile and the accident (36) and that the cause of the accident (in his opinion) was that "the second car was following too close and run into the back of him." (36)

No evidence was offered to show that either

Ramsbacher or the bridge crane would be visible to Bucciarelli as he followed the Jimison auto to a stop or approached it as it was stopped.

Suit was filed by the Jimisons against the United States, proceeding under the Federal Tort Claims Act, for damage to their automobile and, by Mrs. Jimison, for personal injuries. (Vol. 1, 2-5) After a trial the Court ruled that the plaintiff take nothing and the defendant recover its costs. (Vol. 1, 224-238) The decision of the trial is reported at **267 Fed. Sup. 674.** A summary of the Court's ruling is contained in its opinion at page 236 of Vol. 1.

> "Bucciarelli's testimony that he did not see the crane or Jimison car until he was on the bridge is simply incredible. In any event, it is obvious from the testimony of Jerry Jimison and Ramsbacher, as well as the physical facts, that Bucciarelli had a clear, unobstructed view of both the car and crane for at least half a mile. Under the Montana law it was his duty to 'see what is in plain sight', and in legal effect he is in the position of having actually seen the obstruction in ample time to avoid the the collision. Under these circumstances neither Ramsbacher nor the Jimisons were obliged to foresee or anticipate that Bucciarelli would drive his automobile into the rear of the stopped Jimison car.
>
> Bucciarelli's negligence was the sole proximate cause of the accident. His actions constituted an intervening force which was a superseding cause of the accident, precluding any negligence of Ramsbacher from being a proximate cause of the

accident."

A motion for new trial and an exception to one of the Court's findings was made as follows: (Vol I, 241)

"Plaintiffs move the court to set aside its opinion and judgment rendered thereon entered herein on the 26th day of May 1967, and to grant plaintiffs a new trial on the grounds that:

1. The evidence does not support the findings of fact upon which the opinion is based.
2. The court erred in making the following finding contained on page 13 of the typewritten opinion:
   'In any event, it is obvious from the testimony of Jerry Jimison and Ramsbacher, as well as the physical facts, that Bucciarelli had a clear, unobstructed view of both the car and crane for at least half a mile.'
3. The opinion and judgment are contrary to law in that they reduce and narrow the liability of one who negligently obstructs a public highway.
4. The opinion and judgment are contrary to law in that they relieve the defendant from liability for the forseeable consequences of its negligence."

The motion for new trial was denied, the Court saying: (Vol. 1, 268, 269)

"I agree with counsel for the plaintiff that Bucciarelli must have seen the Jimison car and that his use of the word 'see' should be construed as 'perceive' or being 'apprised'. As stated in the opinion, I find Bucciarelli's testimony incredible. The mere fact that he states that he did not see either the Jimison car or the crane until he was on the bridge

does not excuse him from seeing what was 'in plain sight'."

The Court declined to grant plaintiffs a new trial or amend the finding to which exception was taken. This appeal followed. (Vol. 1, 275)

We feel the District Court in releasing the United States from the responsibility for its negligence applied an illogical, outmoded concept which has been generally rejected and for which there is no predicate in this State. Even if the Court's theory is correct there is no evidence to support the finding critical to the application of the theory, that is, that Bucciarelli's view of the obstruction was "clear and unobstructed".

SPECIFICATION OF ERRORS

1. The Court erred in ruling that the United States was excused from responsibility for negligently obstructing a bridge on the basis that another negligent person, Bucciarelli, should have seen the obstruction in time to avoid it.

2. The Court erred in finding on page 13 of the original opinion (Vol. I p. 236) as follows:

"In any event, it is obvious from the testimony of Jerry Jimison and Ramsbacher, as well as the physical facts, that Bucciarelli had a clear, unobstructed view of both the car and crane for at least half a mile."

The reason the finding is erroneous is because

the evidence produced did not indicate as the Court found and the evidence available militates against such finding.

ARGUMENT

THE DEFENDANT, THE UNITED STATES, WAS NEGLIGENT AND ITS NEGLIGENCE CONCURRED IN CAUSING THE INJURY AND DAMAGE FOR WHICH CLAIM IS MADE. (Relative to Specification of Error Number 1)

At the trial the negligence of the United States was not seriously denied. The Court tacitly found the United States negligent when it determined that the negligence of Bucciarelli intervened or superseded as to insulate the defendant from the consequences of its negligence.

In placing its machinery on the bridge as it did, defendant violated a Montana statute. **Sec. 32-21-101 R.C.M. (1947).**

> "(a) No person shall stop, stand, or park a vehicle, except when necessary to avoid conflict with other traffic or in compliance with law or the directions of a police officer or highway patrolman or traffic-control device, in any of the following places: - - -
>
> 13. Upon any bridge or other elevated structure upon a highway - - - - ."

This section of the code is, by another statute, made applicable to vehicles operated by the United States. See **Sec. 32-2127 R.C.M. (1947)**

"(a) The provisions of this act applicable to the drivers of vehicles upon the highways shall apply to the drivers of all vehicles owned or operated by the United States, this State, or any county, city, or town, district, or any other political subdivision of the state, except as provided in this section and subject to such specific exceptions as are set forth in this act with reference to authorized emergency vehicles.

(b) Persons Working on Highways—Exceptions. Unless specifically made applicable, the provisions of this chapter except those contained in sections 32-2176 to 32-2183 shall not apply to persons, teams, motor vehicles and other equipment while actually engaged in work upon the surface of a highway but shall apply to such persons and vehicles when traveling to or from such work."

Violation of a state motor vehicle law designed for the safety and protection of the public constitutes negligence as a matter of law. **Faucette v. Christensen, 145 Mont. 28, 400 P.2d 883, 885, Rader v. Nicholls, 140 Mont. 459, 373 P.2d 312, Daly v. Swift & Co., 90 Mont. 52, 300 P. 265.**

If it can be said that defendant had some right to obstruct the highway then it was obliged to erect a proper warning system. Montana has adopted the Manual on Uniform Traffic Control Devices.

Faucette v. Christensen, 145 Mont. 28, 400 P. 2d 883.

This manual provides that on a two lane highway such as State Highway 16 if "heavily traveled" the warning sequence should begin 1100 feet from the point of obstruction. The first warning is a sign stat-

ing "One Lane Road Ahead". This sign is to be 48 inches by 48 inches, yellow with black lettering. Five hundred feet further down the road is to be another sign of the same size and color reading "Flagman 500 Ft.". Five hundred feet further on is to be a flagman to direct traffic. From the flagman to the point of obstruction there is to be a series of yellow traffic cones to guide one lane of traffic temporarily into the other lane. If the obstruction is on a "lightly traveled" road the manual requires a warning sequence of 850 feet commencing with a sign 30 inches square followed 750 feet later by a series of traffic cones commencing 100 feet from the point of obstruction and placed as to guide all traffic into one lane. (See manual introduced into evidence as Exhibit 20 at pp. 276, 280 and 299.) The only evidence on the point (from Government witness Ramsbacher and patrolman Marshall) was to the effect that at least part of the time the traffic on the bridge was "heavy" requiring the employment of the large signs in sequence and flagman. Even if the road is considered "lightly traveled" and even if Ramsbacher's testimony is accepted as against that of Jimisons', Bucciarelli's and the highway patrolman the sign that he placed was only about 2/3 as large as it was supposed to be and was placed about 1/3 as far from the obstruction as required. No traffic cones were used.

In view of the facts that the highway was, at

least part of the time, heavily traveled, that it was narrow, that it was substantially obstructed, that Ramsbacher's vision and hearing were necessarily preoccupied with his work, that use of warning devices was casual and half-hearted, the happening of the collision under consideration in this case was was more than forseeable, it was inevitable.

THE DECISION OF THE DISTRICT COURT EXCUSING THE DEFENDANT FROM THE CONSEQUENCES OF ITS NEGLIGENCE WAS ERRONEOUS. (Relative to Specification of Error Number 1)

In this case it was not seriously contended that the government was not negligent and the Court by implication found the government negligent. It is clear that but for this negligence the collision would not have occurred. That anyone should be granted immunity in this circumstance does not square with basic tort law precepts of responsibility for fault. There is no basis for according the government special treatment in this matter. The Tort Claims Act provides that the United States is liable " - - - under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." **28 U.S.C.A. 1346.**

The government contrary to the express direc-

tions of a statute enacted for public safety made a practice of obstructing a busy highway for several hours at a time. When this practice resulted in an accident the Court, conceding the negligence of the government, ruled that it was not responsible because Bucciarelli should have seen the obstruction in time to avoid injuring Mrs. Jimison, a third party who was completely innocent of any negligence at all.

In so ruling the District Court adopted a theory that is best described as a legal curiosity. The theory is an illogical, unfair, anachronism denounced by scholars and repudiated by nearly all courts. The theory has not been adopted in Montana and such a theory, further, is contrary to established principles of tort law in Montana. See **Harper and James, The Law of Torts, Vol. 2, Sec. 20.6 pp. 1156-1158.**

> "Another restrictive test, emphasizing chiefly the chronology of intervening human acts, holds only the last wrongdoer liable for an injury produced by the combined effect of successive acts of wrongdoing. This rule may have stemmed in part from a notion (which once had some currency) that the law fulfilled its function if it offered one legally liable defendant to a plaintiff, so that it was superfluous and in some peculiar way uneconomical to offer more. The rule may also be traceable to the reluctance of courts to admit that subsequent unlawful action may be expectable or that earlier wrongdoers should be responsible for such action. At any rate, whatever the reason, the last wrong-

doer rule has been used infrequently and capriciously to limit liability throughout the history of negligence law.

The sporadic instances of such use have probably been confined to a few situations where the law, for reasons of real or supposed policy, has disfavored a type of claim or defense which it nevertheless allows. Thus recovery has been denied in a suit against a municipality for a highway defect if the accident was also contributed to by the wrongful act of a third person. This limitation has found favor in the same class of cases in Pennsylvania also. In nearly all states the doctrine of last clear chance, a variant of the last wrongdoer rule, is employed as a limitation on the disfavored defense of plaintiff's contributory negligence. Occasionally, the defense of contributory negligence itself has been called merely an application of the last wrongdoer rule. And a harsh, indefensible doctrine has recently been fashioned by a few courts to exonerate an illegally parked vehicle from liability, even to innocent victims, wherever the moving driver saw the parked vehicle in time to avoid hitting it."

This last sentence of the above quoted section is footnoted as follows:

"Of course if the only negligence of the parked vehicle is the failure to set out proper signals, that failure is not a cause in fact of being hit by a driver who saw the obstruction anyway. Jilka v. National Mut. Cas. Co., 152 Kan. 537, 106 P.2d 665 (1940). But if the vehicle is standing on a part of the highway where it is forbidden to park, the purpose of the prohibition is surely in part to cut down the

chance of being hit by confused and stupid drivers, as well as by inattentive ones. Yet a few courts have evoked the last wrongdoer rule from the shades of the past to insulate the parked vehicle's operator or owner from liability wherever the overtaking driver saw the obstruction when he still could have stopped. Medred v. Doolittle, 220 Minn. 352, 19 N.W. 2d 788 (1945); Kline v. Myer, 325 Pa. 357, 191 Atl. 43 (1937) (perhaps no different from the Jilka case, supra, but uses broader language). Some courts have even used this kind of reasoning where the overtaking driver negligently failed to see the obstruction. Hubbard v. Murray, 173 Va. 448, 3 S.E.2d 397 (1939); Hataway v. F. Strauss & Son, 158 So. 408 (La. App. 1935); cf. Jaggers v. Southeastern G.L. Co., 34 F. Supp. 667 (M.D. Tenn. 1940). Cases where the accident would have happened anyway even if defendant's car had been left so as to leave the legal clearance are, of course, distinguishable. Schultz v. Brogan, 251 Wis. 390, 29 N.W.2d 719 (1947); Walton v. Blauert, 256 Wis. 125, 40 N.W.2d 545 (1949).

The weight of authority, however, quite properly allows the innocent victim to hold both the one who parked the stationary vehicle and the driver who negligently ran into him. Kieper v. Pacific G. & E. Co., 36 Cal. App. 362, 172 Pac. 180 (1918); cases collected in annotations, 111 A.L.R. 412 (1937), 131 id. 562, 605 (1941)."

See also **Prosser On Torts, 3rd Ed., Sec. 49 p. 285.**

"The last human wrongdoer. A similar formula, which has been stated and followed by some courts, would place the legal responsibility upon the last culpable human actor in point of time, and exempt

all those antecedent to him. This rule may have been due, at least in part, to the idea, which once had some currency, that the law fulfilled its function if it provided one legally responsible defendant, and that it was superfluous, uneconomical, and confusing to the issue to offer more. Such a rule is unworkable in two respects. The last human wrongdoer is not always responsible; he may be relieved because his negligence did not extend to the particular risk, or by reason of unforseen intervening forces over which he had no control. And the earlier actor may be held responsible if he was under an obligation to protect the plaintiff against the later wrongful conduct, as in the numerous cases where the defendant is required to anticipate and safeguard the plaintiff against the negligent, or even the criminal acts of others. Although British law still has some trouble with it, the rule is now of purely historical interest in the United States, except for odd bits and pieces of peculiar law which survive here and there, - - - "

The last sentence of the above quote is footnoted in part as follows:

"See Eldredge, Culpable Intervention as Superseding Cause, 1937, 86 U.Pa.L.Rev. 121, reprinted in Eldredge, Modern Tort Problems, 1941, 205. Also such cases as Medved v. Doolittle, 1945, 220 Minn. 352, 19 N.W.2d 788; Kline v. Moyer, 1937, 325 Pa. 357, 191 A. 43, 111 A.L.R. 406; Hubbard v. Murray, 1939, 173 Va. 448, 3 S.E.2d 397, where one who negligently parks a car is held not liable because another driver has run into it."

THE DECISION OF THE LOWER COURT IS BASED ON A MISUNDERSTANDING OF THE CASE OF **BOEPPLE v. MOHALT.** (Relative to Specification of Error Number 1)

The District Court made its decision turn on the case of **Boepple v. Mohalt, 1936, 101 Mont. 417, 54 P.2d 857,** and relied upon it again in its decision denying the motion for new trial. The case is not in point and is not authority for the Court's decision. In this case Boepple and his wife were driving down a road and ran into a road grader operated by Mohalt. Mrs. Boepple sued Mohalt and the question before the Court was not whether or not Mr. Boepple's negligence intervened in and superseded Mohalt's negligence but whether Mohalt was negligent at all. The case was not concerned with the question of intervening or superseding negligence and is not authority in that field of law. The Court, after considering the charges of negligence against Mohalt and the evidence, ruled that the charges of negligence were not proved and Mohalt was not negligent, saying:

> "On the whole, the pictures all demonstrate clearly and beyond doubt that the alleged sharp curve and steep hill were in reality only of a slight nature; that Boepple's vision or ability to see the grader was in no way obstructed by the hill, curve, or anything else for a distance of at least 239 feet. The entire grader and its exact location on the road were clear-

ly discernible at that distance. Indeed, the pictures demonstrate that there was no obstruction which could have prevented Boepple from seeing the grader at a distance of more than 400 feet, had he been keeping a proper lookout.

The physical facts, as shown by the photographs, together with the evidence, contradict the claims of plaintiff and disclose that there was unquestionably ample room for Boepple to have passed around the grader. This circumstance, together with Boepple's own statement that his eyesight was good, and the evidence showing conclusively that he could have easily stopped or avoided the grader if he had seen it at a distance of 239 feet, lead to the inevitable conclusion that the sole, direct, and proximate cause of the accident was Boepple's failure to keep a proper lookout ahead. Clearly, there is no merit in the allegation that the grader was parked at a concealed or hidden point on a curve near the brow of a hill in such manner that Boepple could not see it until he was too close to avoid the collision. The only evidence disclosed by the record which would tend to controvert this conclusion is Boepple's testimony that he would have had to be within 119½ feet of the grader in order to determine which side of the road it was on, and that he did not see the grader in time to avoid colliding with it, and the bare assertion of Boepple and plaintiff that they were keeping a lookout ahead. - - - - -

Obviously, the sole and proximate cause of the accident here was Boepple's failure to observe and comply with the above requirements, which the law imposes on him."

The Court's ruling that Boepple's acts were the

"sole proximate cause" was not a determination of proximate causation between two negligent defendants but a determination that Boepple, alone, was negligent. At the end of its opinion the Court did say:

> "Even if it were true that defendant was negligent in these particulars, still it is manifest from what we have said already that such negligence was not the proximate cause of the accident;"

This statement is a musing or speculation by the Court on a situation not before it for decision.

> "An expression in an opinion which is not necesasry to support the decision reached by the Court is dictum or obiter dictum." **20 Am Jur 2d, Courts, Sec. 74.**
>
> "In applying the doctrine of stare decisis, a distinction is made between a holding and a dictum. Generally stare decisis does not attach to such parts of an opinion of a court which are mere dicta. The reason for distinguishing a dictum from a holding has been said be that a question actually before the court and decided by it is investigated with care and considered in its full extent, whereas other principles, although considered in their relation to the case decided, are seldom completely investigated as to their possible bearing on other cases."
> **20 Am Jur 2d, Courts, Sec. 190.**

The quoted dictum has never been adopted as the rule of any case in the 23 years following the rendition of the **Boepple** case. We will show in a following subdivision of this brief that Montana has never adopted the "Last Wrongdoer" theory of tort law and

has in fact long followed principles of tort law contrary to any such theory. The dictum is simply an irrelevancy which apparently was the cause of the unfortunate result obtained in this case.

The other Montana cases cited by the Court, **Fulton v. Chouteau County Farmers' Co., 1934, 98 Mont. 48, 37 P.2d 1025, and Merithew v. Hill, D. C. Mont. 1958, 167 F. Supp. 320,** are not concerned with the rights of innocent third persons as against tortfeasors whose torts concur to cause the injury and do not deal with the question of "last wrongdoer" and thus are not authority for the court's position.

THE DECISION OF THE DISTRICT COURT IS CONTRARY TO THE OVERWHELMING WEIGHT OF AUTHORITY. (Relative to Specification of Error Number 1)

Nearly all the courts which have considered circumstances such as in the case at bar have ruled that where the negligence of two tortfeasors concurs to cause injury, the injured person, if innocent, may recover from either or both of them. The "last wrongdoer" rule has generally been repudiated when determining the responsibility of one who illegally parks upon or otherwise obstructs a public highway. There are many cases in this vein. We have not selected from or even cited most of the cases.

One of the cases is **Butts v. Ward (1938), 116 A.L. R. 1441, 227 Wis. 387, 279 N.W. 6.** In this case a truck owner appealed a judgment against him claiming that if the driver of the car which swerved actually saw the truck in time to avoid hitting it then his act was a superseding cause which would relieve the truck owner of liability. The Court ruled against the truck owner, saying:

" - - - but to give to those cases (cited by the truck owner) or to general statements contained in their opinions the effect contended for would be to render nugatory, in most if not all situations, the statutory provision against leaving vehicles in the traveled lane of roads without the designated safeguards, and to disregard the implied statutory declaration that injury to others is reasonably to be anticipated from so leaving them.

The case of Kline v. Moyer, 325 Pa. 357, 191 A. 43, 111 A.L.R. 406, is relied on in support of the theory contended for. The facts in that case are practically the same as in the instant case. The opinion does not state that any safety statute was violated in connection with the standing truck there involved, but such was doubtless the case. Assuming that the ruling in that case supports the contention here made, we cannot follow it. Doing so would permit one driver to violate any statutory regulation without civil responsibility for collisions with another vehicle resulting from his violaton whenever the stuation was such that the driver of the latter vehicle could by the exercise of ordinary care avoid the collision. This would be contrary to our former

holdings as above pointed out. It would disregard the idea of reasonable anticipation involved in proximate causation that is implied from the enactment of statutory safety regulations. Whenever the Legislature enacts a safety statute, it declares that injury from violation of it is reasonably to be anticipated. The Legislature establishes the standard of care to be exercised and liability for injury resulting from violation of the standard follows."

The Court's reasoning, we submit, is logical and is entirely applicable to the matter being considered.

The case of **Kline v. Moyer, 111 A.L.R. 406, 325 Pa. 357, 191 A. 43,** which the Wisconsin Court declined to follow is practically identical on the facts with the **Butts v. Ward** case except that the Court ruled that if the swerving driver saw the parked truck in time to avoid the collision then this would be an intervening cause but if through negligence or inattention he failed to see the parked vehicle it would not be a superseding cause, saying:

"Where a second actor has become aware of the existence of a potential danger created by the negligence of an original tort-feasor, and thereafter, by an independent act of negligence, brings about an accident, the first tort-feasor is relieved of liability, because the condition created by him was merely a circumstance of the accident and not its proximate cause. Where, however, the second actor does not become apprised of such danger until his own negligence, added to that of the existing perilous condition, has made the accident inevitable, the negligent

acts of the two tort-feasors are contributing causes and proximate factors in the happening of the accident and impose liability upon both of the guilty parties."

It is uncontradicted that in the case at bar, Bucciarelli did not become aware of the obstruction until the accident was inevitable. Either the **Butts v. Ward** case or the **Kline v. Moyer** case are good authority for appelant's position.

The case of **North American Van Lines v. Brown, 8th U.S.C.A. Mo. 1957, 248 F.2d 905,** concerned a truck illegally parked upon a highway. The driver of an overtaking vehicle, a Mr. Butterfield, swerved to miss the truck and thereby caused the driver of an oncoming car to swerve and upset causing injuries. The occupant of the car which upset recovered judgment against the truck owner and he appealed claiming that his negligence was not the proximate cause of the upset. The Court upheld the judgment against the truck owner saying:

"Appellant emphasizes that there actually was sufficient room between the rear of the parked truck and the center line of the highway for Butterfield to pass safely by slowing down, driving over the reflectors and negotiating his six-foot wide automobile through the approximate seven and one-half feet remaining between the rear of the trailer and the center line of the highway. They contend that in not doing so, Butterfield was patently negligent, but want of casual connection between defendant's

negligence and plaintiff's injuries was not conclusively established and defendant's driver when he parked in the position and place that he did, should reasonably have considered the probability of injury, not only from careful drivers of other vehicles, but from negligent ones. Leek v. Dillard, supra, Mo. App., 304 S.W.2d at page 66, and cases cited therein. We do not consider the act of Butterfield so extraordinary in this situation as not to be reasonably foreseeable."

See **Jaggers v. Southeastern Greyhound Lines, 6th U. S. C. A. Tenn. 1942, 126 F.2d 762.** In this a driver negligently ran his car into the rear end of a bus which was parked in violation of statute. The question was whether the bus owner should be relieved of liability because its negligence was not the proximate cause of the accident. The Court said that the bus company was liable.

"We cannot agree, as a matter of law, that the negligence of Leftwich was the sole, proximate cause of the accident. If we assume that Leftwich was guilty of gross negligence in driving, we are still confronted with the fact that the bus was left standing upon the highway. Its presence there was a concurring, contributing factor. If it had not been there, there would have been no accident."

The case of **Northern Indiana Transit v. Burk, (1950) 17 A.L.R. 2d 572, 228 Ind. 162, 89 N.E.2d 905** is in point. In this case the suit was by a bus passenger against the bus company (its bus was negligently

parked too far from the curb) and against the driver of an automobile which collided with the bus while it was so parked. The question was whether the bus company should be discharged from a judgment because of the superseding negligence of the automobile operator. The Court held that the bus company was responsible, saying:

> "We think that it could have been found that in its general nature, what actually occurred was a probable consequence of the defendant's negligence, when all the attendant circumstances are considered, and that it was not something which was only remotely and slightly probable.'
>
> The negligence of the operator of a motor vehicle in stopping or parking his car may be a proximate cause of injury even though the negligence of the operator of another motor vehicle is an active force in contributing to the final result."

See also the following cases, all of which are in point and all of which support the rulings in the above cases. **Mason v. Crawford, 1936, 17 Cal. App. 2d 529, 62 P.2d 420; Herzog v. White, 1937, 49 Ariz. 313, 66 P.2d 253; Caylor v. B. C. Motor Transp., 1937, 191 Wash. 365, 71 P.2d 162; Tilden v. Ash, 1937, 145 Kan. 909, 67 P.2d 614; Birks v. East Side Transfer, 1952, 194 Ore. 7, 241 P.2d 120; Stafford v. Roadway Transit Co., 3rd U.S.C.A., Pa. 1948, 165 F. 2d 920; D. C. Transit System, Inc. v. Slingland, U.S. C.A., D. C. 1959, 266 F.2d 465; Northern Liquid Gas**

Co. v. Hildreth 1950, 8th U.S.C.A., Minn. 180 F.2d 330; Stafford v. Roadway Transit Co., W.D. Penn. 1947, 70 F. Supp. 555; Cronenberg v. United States, U.S.D.C., N. C., 1954, 123 F. Supp. 693 Eberhart v. Abshire, 7th U.S.C.A. Ind. 1946, 158 F.2d 24; Thomson v. Bayless, Sup. Ct. Cal. 1944, 24 Cal. 2nd 543, 150 P.2d 413. See also 7 Am Jur 2d, Automobiles, Sec. 371, 131 A.L.R. 605 and Restatment of the Law Torts 2d, Sections 439-447.

There may be an occasional case which is contrary to the foregoing authority. These cases are as **Prosser** puts it " - - - odd bits and pieces of peculiar law - - -" (supra) or as **Harper & James** say " - - - a harsh, indefensible doctrine - - -" (supra).

MONTANA PRECEDENT IS CONTRARY TO THE DISTRICT COURT'S RULING. (Relative to Specification of Error Number 1)

The District Court noted that Montana does not have any cases directly in point on the ruling it made. Montana does, however, have many cases on the question of liability for concurring negligence which show that this state has never adopted the "last wrongdoer" rule but has, to the contrary, a long tradition of placing responsibility for negligence upon all whose negligence concurred in producing the injury whether the negligence be active, passive, first or last.

In the leading Montana case of **Meisner v. City**

of Dillon, 1903, 29 Mont. 116, 74 P. 130, the action was against a city for negligence in allowing its streets to fall into disrepair. When plaintiff's horse ran away the runaway concurring with the city's negligence produced injuries. The defendant city claimed its negligence was not the proximate cause of the injuries but the Montana Supreme Court held otherwise, saying:

> "While this theory of the law (of defendant) has the support of very respectable authority, we prefer to follow the doctrine which appears to be supported by the weight of authority and the better reasoning, viz., that where two causes contribute to an injury, one of which is directly traceable to the defendant's negligence, and for the other of which neither party is responsible, the defendant will be held liable, provided the injury would not have been sustained but for such negligence. Lundeen v. Livingston E. L. Co., 17 Mont. 32, 41 Pac. 995; Elliott on Roads and Streets, Sec. 615; Chicago & N. W. Ry. Co. v. Prescott, 59 Fed. 237, 8 C.C.A. 109, 23 L.R.A. 654; Brennan v. City of St. Louis, 92 Mo. 482, 2 S. W. 481. The question for determination in this instance was not whether defendant's negligence was the sole cause of the injury, but whether it was causa sine qua non. Hayes v. Mich. Central R. Co., 111 U. S. 228, 4 Sup. Ct. 369, 28 L. Ed. 410. This question, we think, was fairly submitted to the jury for determination. The doctrine here announced is very fully set forth in Union St. R. Co. v. Stone (Kan.) 37 Pac. 1012, in an action the facts of which are very similar to the facts in the case at

bar. The court in part says: 'It is urged that there is no liability on the part of the railway company or the city of Winfield for the negligent defect or obstruction of the street, as the runaway team concurred in producing the injuries of Mrs. Stone. This is the rule in Massachosetts, Maine, Wisconsin, and West Virginia, but the contrary is held by the courts of New York, Pennsylvania, Georgia, Missouri, Indiana, Connecticut, New Hampshire, Vermont, and Texas. Elliott, in his recent work on Roads and Streets, says: "According to the weight of authority, the city is liable where a horse takes fright, without any negligence on the part of the driver, at some object for which the municipality is not responsible, and gets beyond the control of his driver, and runs away, and comes in contact with some obstruction or defect in the road or street which the city has been negligent in not removing or repairing, if the injuries would ot have been sustained but for the obstruction or defect." * * * We prefer to follow the general weight of authority, and therefore cannot adopt the rule that cities are not liable for injuries to a runaway horse or his owner occasioned by an obstruction or defect in the streets.' "

The Montana courts have consistently ruled that if the negligence is the cause without which the injury would not have occurred (causa sine qua non) then if the defendant is responsible for the cause he is responsible in damages.

In the very early case of **Lundeen v. Livingston Electric Co. (1895) 17 Mont. 32, 41 P. 995,** the action was against a power company for negligently obstruc-

ting a public way. The plaintiff was injured when her horse shied and ran into a post, the property of defendant. The post broke and its guy wire (which was so low on its lower end as to obstruct ordinary traffic) dragged plaintiff from her horse and injured her. The question for the Court on appeal was whether or not the low placing of the guy wire was the proximate cause of the injury. The Court held for the plaintiff, saying:

> "We think it was the duty of the defendant to have placed this guy wire so high above the ground that persons could pass under it, either on foot or horseback, in the day or night time, without danger of being injured. Placed as it was, it was not only an obstruction to the free and ordinary use of the street, but it was dangerous to the safety of persons who had the right to travel the streets. We think that a reasonably prudent person must have foreseen, when stringing this wire in the street as it was strung, that just such accidents and calamities were liable to occur as happened to the plaintiff in this case."

The case of **Mize v. Rocky Mountain Bell Telephone Co., (1909) 38 Mont. 521, 100 P. 971,** considered the question of proximate cause. Some wires on a telephone company pole fell onto the wires of a power company and became energized. About nine miles away the electricity was conducted down a guy wire (which touched the telephone wire) to a fence (which

also touched the guy wire) thence along the fence to another fence for a distance of about 3/4 mile where the claimant's decedent come in contact with the fence and was killed. One of the contentions was that the guy wire touching the telephone wire constituted a superseding cause as to the power company's liability. The Court ruled otherwise, saying:

> "What intervening cause will break the chain of sequence and so far insulate the first wrongdoer's negligence from the injury as to relieve such wrongdoer? The courts have experienced some difficulty in answering this inquiry, and they are not altogether in harmony upon the subject; but to this extent they may be said to agree: That to relieve the original wrongdoer the result must be such that he could not reasonably have anticipated it. In 29 Cyc. 499, the rule is stated as follows: 'The mere circumstance that there have intervened between the wrongful cause and the injurious consequence acts produced by the volition of animals or persons does not necessarily make the result so remote that no action can be maintained. The test is not to be found in the number of intervening events or agencies, but in their character and in the natural connection between the wrong done and the injurious consequence, and if such result is attributable to the original negligence as a result which might reasonably have been foreseen as probable, the liability continues.' What ought to be foreseen or anticipated as the probable consequence of the wrongdoer's negligence? In the first instance, it is not necessary to show that he ought to have anticipated the partic-

ular injury which did result; but it is sufficient to show that he ought to have anticipated that some injury was likely to result as the reasonable and natural consequence of his negligence. This is the meaning of section 6068, Rev. Codes, and expresses the rule announced by this court in Reino v. Montana M. L. Dev. Co., 38 Mont. ....., 99 Pac. 853. - - - - these defendants ought reasonably to have anticipated that, by their negligence in permitting this private wire to become charged with a dangerous current of electricity, serious injury would result to someone if in fact the private wire, or wire leading from it, was exposed as it might be exposed."

In the case of **McCloskey v. City of Butte, 1927, 78 Mont. 180, 253 P. 267,** the action was by a pedestrian against the city for negligently allowing a trap door to be placed in a sidewalk. As plaintiff stepped on or near the door it was opened by another person causing plaintiff to be thrown down and injured. On considering the question of proximate cause, the Court held the city to be responsible quoting with approval from another authority.

" 'It is not necessary that the cause of the injury should be the immediate, the last, or the nearest cause, in time or distance, to the consummation of the injury. It is sufficient if it be the efficient cause which set in motion the chain of circumstances leadng up to the injury and which, in natural, continuous sequence, unbroken by any new and independent cause, produced the injury. The primary cause will be the proximate cause where it is so linked and bound to the succeeding events that all create or be-

come a continuous whole, the one so operating on the others as to make the injury the result of the primary cause. * * * As a general rule, it may be said that negligence, to render a person liable, need not be the sole cause of an injury. It is sufficient that his negligence, concurring with one or more efficient causes, other than plaintiff's fault, is the proximate cause of the injury.' "

The case of **O'Brien v. Corra-Rock Island Mining Co., 1909, 40 Mont. 212, 105 P. 724,** was an action by a miner against his employer for injuries caused by an explosion. It appeared that the employer had caused blasting caps to be negligently stored with explosives but the actual explosion was caused by the negligence of plaintiff's fellow servant. The negligence of both the employer and fellow servant having been found, the question was whether or not the negligence of the fellow servant superseded that of the employer. The Court held not, saying:

"If the jury found that the defendant company was guilty of negligence in storing the powder where it was stored, and knew or by the exercise of ordinary care ought to have known that caps were kept with the powder, and that but for such negligence the accident would not have occurred, then, even though the negligence of a fellow servant of O'Brien caused the explosion, the defendant company would not be entitled to escape liability. Meisner v. City of Dillon, 29 Mont. 116, 74 Pac. 130. And the same result would be reached if the cause of the explosion could not be attributed to the negligence of any one; - - "

See also **Burns v. Eminger, 1929, 84 Mont. 397, 276 P. 437; Bensley v. Miles City, 1932, 91 Mont. 561, 9 P.2d 168; Stewart v. Stone & Webster Engineering Corporation, 1911, 44 Mont. 160, 119 P. 568; Birsch v. Citizens' Electric Co., 1908, 36 Mont. 574, 93 P. 940; Frederick v. Hale, 1910, 42 Mont. 153, 112 P. 70; Smith v. Bonner, 1922, 63 Mont. 571, 208 P. 603.** These cases are all concerned with the question of defendant's negligence concurring with the negligence of another or with an act of God to produce the injury to the claimant. In deciding the question the Montana Courts have consistently taken the position that responsibility will be placed on the defendant for his negligence if the injury would not have occurred without the negligence. Applying this test to facts under consideration, the Montana Court would undoubtedly hold that the United States in obstructing the bridge so that two vehicles could not pass would have to bear the responsibility for the resulting collision. Montana law is uniformly against the idea of releasing, under the guise of proximate cause, the first wrongdoer or the passive wrongdoer.

THE MINORITY VIEW, RELIED UPON BY THE COURT, DOES NOT CLEARLY SUPPORT THE COURT UNDER THE FACTS OF THIS CASE. (Relative to Specification of Error Number 1)

The District Court relies upon cases decided in

Utah for its position that one approaching a negligently placed object on the highway is the sole proximate cause of a collision between his vehicle and the object if he could have seen it in time to avoid the collision.

Actually, Utah is in accord with the majority rule in its holdings. See **United States v. First Sec. Bank of Utah, U.S.C.A. 10th Cir. Utah, 1953, 208 F.2d 424.** In this case one Vernon, a mail truck driver, caused his mail truck to suddenly slow without a proper signal. This caused a truck operated by one Mardis which was following to come to an emergency stop. The emergency stop caused the truck to jackknife into the adjoining traffic lane and cause collision with an oncoming automobile operated by plaintiff. Suit was brought against the United States under the Tort Claims Act and the question presented to the Court of Appeals was whether or not the United States should be absolved from responsibility because Mardis' negligence was the sole proximate cause of the collision. The Court ruled against the United States, saying:

> "The remaining contention is that the trial court erred in not finding that Mardis' negligence was the sole proximate cause of the plaintiffs' injuries. The United States urges that the doctrine of proximate cause requires a continuous and unbroken sequence of events to establish liability, and that where the

original wrong only becomes injurious in consequence of the intervention of some distinctive intervening negligent act by others, the proximate cause of the injury will be imputed to the second wrongdoer. This is a correct statement of the abstract law, but to be applicable it must be shown that the intervening act would have caused the injuries independently of the original wrong. 38 AmJur., Neg. Sec. 63. Assuming that Mardis was negligent and that without such negligence the collision would not have occurred, it is equally true that without Vernon's negligence the collision would not have occurred. The collision and the injuries to the plaintiffs would not have occurred without the concurring acts of both Mardis and Vernon. The court did not make a finding as to the negligence of Mardis. It merely found that if he was negligent, his negligence was not the sole proximate cause of the injury. With this finding we agree.

The negligence of one person cannot be justified by the concurring negligence of another. Where several causes producing an injury are concurrent, and each is an efficient proximate cause without which the injury would not have occurred, the injury may be attributed to all or any of the causes. Here the two separate acts occurred at the same time and both contributed to the injuries. If the acts constituted negligence both Vernon and Mardis were responsible, and the plaintiffs could proceed against one or both of them. McKenna v. Scott, 10 Cir., 202 F.2d 23; McClave v. Moulton, 10 Cir., 123 F.2d 450. This is the rule in Utah. Charvoz v. Bonneville Irr. Dist., Utah. 235 P.2d 780; Caperon v. Tuttle, 100

Utah 476, 116 P.2d 402, 135 A.L.R. 1399; Jenkins v. Mammoth Mining Co., 24 Utah 513, 68 P. 845; Handley v. Daly Mining Co., 15 Utah 176, 49 P. 295; Annotation 131 A.L.R. 605. Caperon v. Tuttle, supra (100 Utah 476, 116 P.2d 404), was an automobile case. The court said, 'The cases are numerous which hold that if injuries result from a collision, the proximate causes of which are the concurring negligent acts of the driver and a third person, recovery may be had against either or both of such negligent persons.' It is obvious from the evidence here that the collision and the resultant injuries to the plaintiffs would not have occurred except for the acts of both Vernon and Mardis. Vernon or his employer cannot escape liability because the acts of Mardis contributed to those injuries."

The foregoing is a precise statement of the rule upon which we rely in this case. The District Court relied upon the case of **Velasquez v. Greyhound Lines, Inc., 1961, 12 Utah 2nd 379, 366 P.2d 989** (cited by the Court in its opinion pp. 233-234 of Vol. 1) This case uses the language quoted by the Court but the facts of the case are such that the same result would have been obtained under the majority rule. The facts were as follows:

"The Greyhound bus driver, by his own admission saw the Interstate truck as he approached. He said he first observed it from about three-fourths mile away and that he realized that both the truck and the Buckley car were stopped while he was still one-half mile away. If there had been flares out, or even

if the truck had been aflame, it could have given him no more information. He said he intended to stop behind the truck to render assistance and to add the benefit of his lights to the scene. As to how far the truck extended onto the highway: he testified that it appeared that there would have been room for him to go by in the same traffic lane without moving left into the center lane.

The evidence is without dispute that as the Greyhound bus approached this scene a very strange thing happened: the bus driver momentarily lost consciousness by either falling asleep or blacking out from some other cause. He was roused to consciousness just before the impact by the warning cry of a woman passenger: 'Don't hit it.' He swerved the bus to the left but not in time to avoid hitting the left rear corner of the truck. Plaintiff is one of several passengers injured in the collision."

Under the majority rule the result would have been the same because the bus driver actually saw the obstruction in adequate time to avoid the acciden; that the "very strange thing" which happened when the driver became unconscious was not a forseeable risk.

In the case of **Hillyard v. Utah By-Products Co., 1953, 1 Utah 2d 143, 263 P.2d 287,** (cited by the Court p. 234 of Vol. I) the plaintiff was riding with one who had a bottle of beer in one hand and was driving 50 miles per hour in a 25 mile per hour zone while passing other automobiles finally running his automobile into

a negligently parked truck. In a suit against the owner of the parked truck, the Court refused to excuse the truck owner from liability on the claim that the negligence of the automobile operator was the sole proximate cause of the collision. The Court, in disposing of the case, quoted the rule relied upon by this District Court, i.e., the negligence of the second actor is superseding if he should have seen the obstacle, but went on to hold that this rule didn't apply if the second actor's inattention persisted until he was in an "emergency situation". The case of **Nyman v. Cedar City, 1961, 12 Utah 2d 45, 361 P. 2d 1114,** (Cited by the Court p. 235 Vol. 1) involved a collision by an automobile with a bank of dirt left by the city in installing a curb and gutter. The collision was at night and the automobile was an unlicensed "Model T" with headlights and brakes "not up to standard", operated by a negligent, drinking driver. The Court rejected the claim of the city that the driver's negligence superseded its own and affirmed a lower court judgment against the city in favor of one of the automobile passengers. After quoting the rule relied up by the District Court, the Utah Court said it didn't apply and that rule was not relied upon.

> "But a different principle applies if the later actor (the driver Walton), even though acting negligently, did not become aware of the danger until too late to avoid striking the obstruction. After get-

ting into such an emergency situation, his action in driving into the obstruction could be regarded as acting in combination with the prior negligence of the city as a concurring proximate cause of the accident. In that event his act would not be the sole proximate cause."

The foregoing is a fairly concise statement of the majority rule. It is not authority for the District Court's position and is, in fact, directly contradictory to it.

The case of **Koff v Johnson, 1965, 1 Ariz. P.196 401 P.2d 150,** (cited by the court Vol. I, p. 235) involved a claim against a defendant who blocked one lane of an intersection in attempting to turn with her vehicle. An approaching driver in the same lane in attempting to avoid her, lost control of his vehicle and ran into a third vehicle. On a suit by the driver of the third vehicle, the trial court directed a verdict in favor of the defendant. Later the trial judge granted a new trial because the direction of a verdict, it decided, was error.This grant of new trial was appealed and the judgment was affirmed. The appellate court said that the jury could have found that the second actor negligently became confronted with "an emergency situation" in which case his negligence would not supersede that of the first actor in causing the highway to be obstructed.

The **Velasquez** case does not apply, on the facts, to this discussion. The other cases cited by the

Court in its opinion as supporting its decision do not do so. The rule relied upon by the Court is that the one obstructing the highway is cleared of responsibility if the following driver saw or **should have seen** the obstruction in time to avoid it. The cases cited by the Court do not apply this rule if the following driver through negligent inattention failed to see the obstruction in time to avoid it. This holding is particularly clear in the case of **Nyman v. Cedar City** (supra). In the case at bar it appears without contradiction that Bucciarelli through negligent inattention did not see the Jimison automobile until too late to avoid colliding with it. His view of the obstruction was also limited or lacking. Under the circumstances the Courts of Utah and Arizona, two of the very few Courts to announce the rule upon which the District Court relies, probably would rule for the plaintiffs rather than the defendant.

In its order denying motion for new trial (Vol. I, p. 273, 274) the District Court cites the case **Beesley v. United States, U.S.C.A. 10th, 1966, Okla. 364 F.2d 194,** which, on its face, supports the Court's decision. In this case a highway was obstructed by a United States vehicle which ran out of gas and a following car was forced to stop, whereupon, a second tortfeasor rearended the car which stopped. The case was decided without transcript. Since the second following ve-

hicle was found negligent for "having defective brakes" it is fair to conclude that its driver saw the other two parked vehicles in adequate time to stop but was unable to do so for lack of brakes. If this conclusion is accurate then the case is in accord with the majority of cases. The District Court says (Vol. I, p. 274) that Montana law is "substantially the same" as the Oklahoma law quoted in the opinion, as follows:

> "Where the negligence complained of only creates a condition which thereafter reacts with a subsequent, independent, unforseeable, distinct agency and produces an injury, the original negligence is the remote rather than the proximate cause thereof. This is held to be true though injury would not have occurred except for the original act."

We do not agree with the District Court in this observation. A subdivision of this brief shows what Montana law is on this general question. Conceivably, Oklahoma jurisprudence does differ from Montana's and from the overwhelming majority of other jurisdictions on this point. If it does so differ, it is antiquated and unjust.

THE COURT ERRED IN FINDING THAT BUCCIARELLI HAD A CLEAR, UNOBSTRUCTED VIEW OF BOTH JIMISON'S CAR AND THE CRANE OPERATED BY RAMSBACHER FOR AT LEAST HALF A MILE. (Relative to Specification of Error Number 2)

Specification of Error Number 2 and this portion of the argument need only be considered if the Court determines the minority view should prevail on the legal question presented.

The great majority of the cases hold that one who negligently obstructs a public highway is responsible to the injured third person if such negligence combines with the negligence of another to injure the third person. If this Court follows the majority rule then whether Bucciarelli had a clear view of the highway and the obstruction in it is irrelevant. If this Court adopts the minority view then the accuracy of the District Court's finding should be considered. Recalling the sequence of events, Ramsbacher obstructed the Northbound lane of the bridge with the crane. (11, 13-14) The Jimison automobile stopped about 60 feet away (59-60) and was rearended by Bucciarelli. (60-62) The Jimison automobile had six people in it. (50-51) There is not a shred of evidence that Bucciarelli could see through it or see the obstruction around either side of it. Buciarelli said he did not see the bridge crane until after the accident. (128) The Court ruled:

> "In any event, it is obvious from the testimony of Jerry Jimison and Ramsbacher, as well as the physical facts, that Bucciarelli had a clear, unobstructed view of both the car and crane for at least half a mile." (Tr. Vol. I, p. 236)

Bucciarelli has no recollection of following the

Jimison automobile until immediately prior to the accident. (122, 124) Ramsbacher said he saw the automobiles come around the corner over 2100 feet away (Ex 10), that they " - - were fairly close together. That is how come I was more or less interested in them." (110) He said they were still close together as they come upon the bridge (32), that there was no interval of time between th stopping of the Jimison automobile and the collision (36) and that the cause of the collision (in his opinion) was that "the second car was following too close and run into the back of him." (36) Neither Jerry Jimison nor his mother testified as to how far the Bucciarelli automobile was following them. Both of them testified that Jerry's foot was still on the brake when the collision occurred. (61, 94) On this record plaintiffs excepted to the Court's finding which exception was not allowed, the Court saying: "It is clear from all of the testimony, which is detailed in the Court's opinion, that the Jimison car was a considerable distance ahead of the Bucciarelli car (at least a quarter of a mile) when they come around the curve." (Tr. Vol. I, pp. 267-268) All of the evidence produced is exactly to the contrary of this finding; Bucciarelli was following closely behind the Jimison automobile in which position it would be difficult or impossible for him to see over it or around to any obstruction in the highway. But even if the

finding were true, that Bucciarelli could see the Jimisons stopped in the highway for a moment before the collision and was not following closely there still is not a shred of evidence that he could see through or around the Jimison auto to the bridge crane which was in front of the auto and in the same lane of travel. Surely, since the Jimison auto was between Bucciarelli and the crane there is no basis for finding that Bucciarelli's vision was "unobstructed". The thinking of the minority of Courts who excuse the one who negligently obstructs a highway is that the obstruction is in plain view. The District Court in applying this rule to a situation where the obstruction was at least substantially obscured and probably invisible to the other tortfeasor has added a new dimension to "a harsh, indefensible doctrine." **Harper & James** (supra)

CONCLUSION

In this case the District Court conceding that the United States was negligent, and it clearly appearing that the accident would not have happened except for the United States' negligence, absolved the United States of all responsibility for damages, even though it was also conceded, there was no negligence on the part of the injured claimants on the grounds that the tortfeasor whose negligence concurred with that of the United States should have seen the negligently caused obstruction in time to avoid it. In so ruling

the District Court ignored elementary tort law to the effect that the tortfeasor is to be held responsible for injuries caused by his torts, disregarded the overwhelming weight of authority in other jurisdictions which have decided this point, ignored Montana principles of jurisprudence, which, properly applied, would have resulted in a correct decision, misapplied obiter dictum from the courts of this state and the courts of sister states, and in the role of determining proximate cause, actually applied the "last wrongdoer" rule which, according to **Prosser,** (supra) is "- - -peculiar law - - - of purely historical interest- - -", and of which **Harper & James** (supra) say is "a harsh, indefensible doctrine." Since this ruling by the District Court is purely a question of law, this Court is not bound by the "clearly errouneous" test set forth in **Rule 52 F.R. Civ. P., Republic Pictures Corp. v. Rogers, U.S.C.A. 9th Cal., 1954, 213 F.2d 662.** If the Court adopts the legal theory of the District Court the next question is whether Bucciarelli had a "clear and unobstructed" view of the highway obstruction, the bridge crane, in time to avoid it. We feel there is no evidence at all to support this finding, only some deductions drawn from sketchy, uncertain facts, and contrary to the testimony of the government's eyewitness, Ramsbacher - - - "a finding is 'clearly erroneous' when although there is evidence to support it, the

reviewing Court on the entire evidence is left with the definite and firm connection that a mistake has been made." **C.I.R. v. Duberstein, 363 U. S. 278, 80 S. Ct. 1190, 4 L. Ed 2d 1218 (1960).**

The cause should be reversed and remanded to the District Court for new trial.

Respectfully submitted.

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By .....

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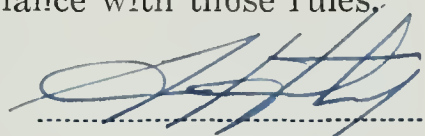
I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.



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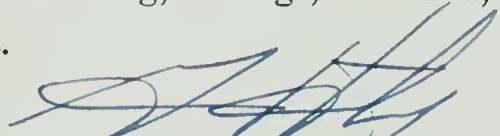
I, Gene Huntley, one of the attorneys for Plaintiffs and Appellants in the above-entitled action, hereby certify that on the 15th day of July, 1968, I served the within brief upon Clifford E. Schleusner and Moody Brickett, attorneys for Defendant and Appellee by depositing 3 copies ~~a copy~~ in the United States mails, postpaid, addressed to them at U. S. Attorneys Office Federal Building, Billings, Montana, their last known address.



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APPENDIX

EXHIBIT INDEX

Number	Description	Identification page	Disposition	Page
Defendant's No. 2	Photo — bridge	103-104	Admitted	106
Defendant's No. 3	Photo — bridge	105	Admitted	106
Defendant's No. 4	Photo — bridge	105	Admitted	106
Defendant's No. 5	Photo — Bridge	105	Admitted	106
Defendant's No. 6	Photo — bridge	105	Admitted	106
Defendant's No. 7	Photo — bridge	105	Admitted	106
Defendant's No. 8	Photo — bridge	106	Admitted	106
Defendant's No. 9	Photo — bridge	106	Admitted	106
Plaintiff's No. 10	Drawing —roadway & bridge	19	Admitted	19
Plaintiff's No. 11	Photo—roadway approaching bridge	22	Admitted	80
Plaintiff's No. 12	Photo—roadway approaching bridge	22	Admitted	80
Plaintiff's No. 13	Photo—highway showing guard rails & bridge	23	Admitted	80
Plaintiff's No. 14	Photo—approach & bridge	20	Admitted	8
Plaintiff's No. 15	Photo — bridge	23	Admitted	80
Plaintiff's No. 16	Photo — bridge	23	Admitted	8
Plaintiff's No. 17	Photo—highway showing curve	24	Admitted	80
Plaintiff's No. 18	Photo — river & side view of bridge	24	Admitted	8
Defendant's No. 19	Copy of drivers license application	68	Ruling Reserved	13
Plaintiff's No. 20	Manual—traffic control	81	Admitted	10
Plaintiff's No. 53	Diagram of accident, officers field notes	117	Admitted	11